

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELOISE SMITH,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SL07528810295

DATE: JUN 16 1989

Michael D. Bowling, Esquire, Middlesboro, Kentucky,
for the appellant.

Timothy Goblirsch, Esquire, Fort Knox, Kentucky, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on October 20, 1988, that sustained her removal from her position with the Department of the Army, Fort Knox, Kentucky. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS this appeal for adjudication in accordance with this Opinion and Order.

BACKGROUND

The agency removed the appellant from her position of Military Personnel Clerk (Typing), GS-204-04, U.S. Army Second ROTC Region, Fort Knox, Kentucky, effective June 10, 1988. The agency charged that the appellant: (1) Attempted to intimidate a coworker/interfered with an agency investigation; (2) delayed carrying out her supervisor's instructions; and (3) performed her duties at the "minimally acceptable" level.

The appellant filed an appeal of her removal with the Board's St. Louis Regional Office, which transferred the appeal to the Philadelphia Regional Office for adjudication. Appeal File, tabs 1 and 3. The appellant had requested a hearing on her appeal, and, by order dated July 27, 1988, the administrative judge scheduled the hearing for September 29, 1988, in Lexington, Kentucky. Appeal File, tab 10. On September 6, 1988, the administrative judge received the appellant's prehearing submission, including a proposed witness list that named forty-one witnesses. Appeal File, tab 14, exhibit B.

The administrative judge conducted prehearing conferences on September 12 and 19, 1988, and prepared a brief memorandum to document them. The administrative judge approved the agency's requested witnesses and approved thirteen of the appellant's requested witnesses. On September 19, 1988, 10 days before the original date of the hearing, the administrative judge rescheduled the hearing to

begin 2 days earlier, at noon on September 27, 1988, and to continue through September 28, 1988. Appeal File, tab 16. Although it is not recorded in the prehearing conference memorandum, on September 19, 1988, the appellant's attorney informed the administrative judge that he was scheduled to appear in a local court for a driving-under-the-influence (DUI) case on September 27, 1988, and had two cases scheduled for the following day; the administrative judge later stated that the appellant's representative assured him that he could have the DUI case rescheduled and obtain continuances in the other court cases. Appeal File, tab 21 at 2.

The appellant's representative was unable to have the cases rescheduled. His father contacted the regional office by telephone on September 22, 1988, and informed a member of the staff that his son was unsuccessful in his attempts at rescheduling his other cases and had difficulty in delivering the subpoenas for his witnesses in this appeal. Appeal File, tab 21 at 2. The administrative judge was informed of the call on the same date, it was made and attempted to call the appellant's attorney, who was out of town. *Id.* at 2-3. The administrative judge spoke with the appellant's representative's father and informed him that the hearing would go on as scheduled and suggested that overnight mail or personal delivery be used for timely delivery of the subpoenas. *Id.* at 3.

Shortly before the hearing was scheduled to begin on September 27, 1988, the appellant's representative had a written request for continuance, supported by an affidavit, delivered to the site of the hearing. The formal request for continuance identified the lack of time for the appellant's witnesses to respond to the subpoenas and the inability of the appellant's attorney to have his criminal cases rescheduled. Appeal File, tab 19.

The administrative judge gave the agency an opportunity to respond to the appellant's request for a continuance, and the agency responded, objecting to it. The agency's representative stated that the appellant's representative contacted him 6 days before the scheduled hearing and informed him that he was attempting to seek a continuance. Appeal File, tab 20. The agency's representative spoke with the appellant's representative 4 days before the hearing and the day before the hearing and was informed that the continuance had not been granted. *Id.* The agency's representative also noted that he was present at the scheduled hearing with the agency's five witnesses, four of whom had travelled a distance in excess of 100 miles to be there. *Id.* The agency therefore argued that the appellant had not established good cause for her last-minute request for a continuance. *Id.* at 2.

The administrative judge denied the appellant's motion for a continuance in an order issued October 6, 1988. Appeal File, tab 21. He found that the appellant had not

asserted that any crucial witness was unavailable. *Id.* at 3. He also found that the appellant's representative had assured him that his DUI case could be rescheduled and had failed to explain why he could not attend afternoon or evening sessions of the hearing even if he had been unable to reschedule the DUI case. *Id.* The administrative judge informed the parties that he would decide the appeal on the basis of the written record and allowed 10 days for the submission of additional evidence and argument. *Id.*

The appellant filed a motion for reconsideration of the administrative judge's order denying the requested continuance. Appeal File, tab 23. The appellant's attorney filed an affidavit and a copy of the criminal court docket to show that he could not have attended afternoon or evening sessions of the hearing. *Id.* at 9-20. The appellant's attorney disputed the administrative judge's assertion that he had assured the administrative judge that his conflicting cases could be changed. *Id.* at 9-12.

The administrative judge denied the appellant's request for reconsideration on October 20, 1988. Appeal File, tab 25. On the same date, the administrative judge issued his initial decision sustaining the agency's action and finding that the appellant had failed to meet her burden of proof on her affirmative defenses of discrimination on the bases of her sex and age, sexual harassment, and reprisal for filing a complaint of discrimination. Appeal File, tab 26.

The appellant filed a timely petition for review on November 18, 1988, which the Board did not receive. Petition for Review (PFR) File, tabs 3 and 4. The agency filed a response to the petition on December 12, 1988, and the appellant replied to it. PFR File, tabs 1 and 2. On December 29, 1988, the appellant filed a copy of her petition for review with the Board. PFR File, tab 4.

The appellant alleges that the administrative judge erred in denying her request for a continuance, sustaining the agency's charges, and not sustaining the appellant's affirmative defenses. *Id.* In its response to the petition for review, the agency alleges that the administrative judge properly denied the request for a continuance and correctly decided the merits of the appeal. PFR File, tab 1. In reply to the agency's arguments, the appellant disputes the agency's allegations and asks that the appeal be remanded for a hearing by a different administrative judge. PFR File, tab 2.

ANALYSIS

The administrative judge erred in denying the appellant's request for a continuance.

Administrative judges have substantial discretion under 5 C.F.R. §§ 1201.41(b)(6) and (8) with respect to convening a hearing and ruling on motions. See *Kendrick v. United States Postal Service*, 36 M.S.P.R. 696, 698 (1988). However, a request for postponement of a hearing may be granted for good cause shown. See *Roberson v. Department of Health and Human Services*, 24 M.S.P.R. 240, 241 (1984).

"Good cause" is an elastic concept which rests upon principles of equity and justice. *Id.* at 241-42.

We find that such good cause for postponing the hearing exists under the circumstances of this appeal. The administrative judge originally scheduled a hearing 2 months in advance, and then, just 10 days before the originally scheduled hearing was to begin, he advanced the hearing date by 2 days.¹ At the time, the appellant's attorney informed the administrative judge that he had hearing conflicts for both of the earlier days, but that he would seek their postponement. Shortly thereafter, 5 days before the hearing began, the appellant's attorney had the administrative judge notified orally that he was unsuccessful in his attempts to reschedule those earlier hearings, so that he could not attend the first 2 days of the Board hearing. We also note that the agency has not disputed the assertion of the appellant's attorney that the agency's representative had no objection to a continuance of the Board's hearing when the scheduling conflict was first raised. The administrative judge nonetheless informed the appellant that the hearing would proceed as scheduled.

To be sure, the Board's regulations require that a motion for hearing continuance be made in writing, 5 C.F.R.

¹ We are aware that the administrative judge scheduled these additional days to accommodate the appellant's 13 witnesses, but we can discern no reason to penalize the appellant, in effect, for requesting 41 witnesses and having 13 approved to provide relevant and nonrepetitious testimony.

§ 1201.55, and, in this case, the appellant's attorney did not file a written motion for continuance until the first day of the hearing, just before it was to begin. We find that the administrative judge abused his discretion by not granting the motions for continuances upon being informed that the appellant's attorney could not alter his prior commitments. Scheduling conflicts can establish good cause for granting a requested postponement. See *Roberson v. Department of Health and Human Services*, 24 M.S.P.R. at 242. See also *Massey v. Department of the Army*, 31 M.S.P.R. 435, 437 (1986) (the Board has consistently recognized the cardinal importance of an appellant's right to a hearing); *Williams v. Department of the Navy*, 4 M.S.P.R. 427, 430 (1980) (when time is of the essence, good cause may be established for waiving the Board's procedural regulations).

We also find, however, that the appellant has not established that the administrative judge was biased against her. See *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980) (in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators). We therefore find no basis for directing that this appeal be reassigned to another administrative judge on remand.²


² Because of our disposition of this case, we find that it is not necessary for us to address the appellant's allegations concerning the administrative judge's findings on the merits of her appeal.

ORDER

Accordingly, the Board REMANDS this case to the Philadelphia Regional Office for a hearing and full adjudication on the merits. The administrative judge will then render a new initial decision addressing all relevant and material issues in this appeal.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board